

STATE OF MICHIGAN
COURT OF APPEALS

ALVIN D. FRISCH, JR. and SUE ANN FRISCH,

Plaintiffs-Appellants,

v

STATE FARM FIRE & CASUALTY CO.,

Defendant-Appellee.

UNPUBLISHED

January 16, 2007

No. 263939

Kalamazoo Circuit Court

LC No. 03-000609-CK

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiffs Alvin and Sue Ann Frisch filed a complaint against their insurer, defendant State Farm Fire and Casualty Company, to recover damages caused by a fire at their home. A jury found that Alvin had a wrongful connection to the fire and that Sue Ann intentionally concealed or misrepresented material facts related to their insurance claim. Accordingly, on February 17, 2005, the trial court issued an order entering a judgment of no cause of action on behalf of defendant. Plaintiffs appeal as of right. We affirm.

According to Alvin, he was home alone on September 6, 2002. At approximately 8:05 a.m., he turned one of the kitchen stove's burners to the "high" position and fried bacon and eggs. He left the house at approximately 8:30 a.m., without seeing or smelling anything unusual. Alvin returned to the house at 9:30 or 10:00 a.m. and saw flames coming from the kitchen window. Defendant denied plaintiffs' claim for damages in light of evidence that Alvin intentionally started the fire and that Sue Ann intentionally concealed or misrepresented facts regarding the couple's financial status at the time of the fire. Plaintiffs thereafter filed this suit.

Adolf Wolf, plaintiffs' cause and origin expert, reviewed the scene several months after the fire and concluded that the fire was accidental. He opined that Alvin most likely left the right front burner of the stove on "high" with the frying pan resting on top of the burner. As the bacon grease inside the pan heated, the grease emitted a vapor that ignited combustible materials on the counter to the left of the stove. Wolf opined that a person could see and smell the vapor from the pan after 5 to 15 minutes, but that the fire smoldered for 60 to 90 minutes before fully "taking off" and burning upward.

Wolf testified that the cabinets surrounding the stove burned from the outside inward. Based on the soot and heat patterns on the walls and stove, he opined that the fire destroyed the counter to the left of the stove first. Next, it traveled to the cabinet above the stove. As the

cabinet above the stove burned, and eventually collapsed, the cooking oil and melted grease inside the cabinet poured onto the stove and lower cabinets. The oil and grease, as well as debris from the upper cabinet, fell into the exposed interior of the lower left cabinet, igniting the flammable food products inside. The oil and grease also seeped through the perforating burn in the lower right cabinet into the cabinet's interior.

During Wolf's testimony, plaintiffs' attorney attempted to introduce exhibit 14, a photograph showing a perforation or hole in the cabinet to the right of the stove. Following defense counsel objection to the admission of the photograph the court denied plaintiff's motion to admit the evidence.

A firefighter called to the scene testified that the area to the left of the kitchen stove sustained the most fire damage. The cabinet to the right of the stove suffered only slight damage, but there was a burned, "wadded up paper towel" in the corner of the cabinet. He believed that the fire was suspicious and contacted the state police fire marshal.

State police fire marshals Leroy and Curran testified as expert witnesses on behalf of defendant. Because of the disparity in the degree of damage done to the two cabinets, Leroy concluded that the fire originated in the cabinets beside the stove. He indicated that the fire would have traveled to the upper cabinet first, destroying that cabinet and the ceiling above it, if the fire had started on the stovetop. Then, when the upper cabinet collapsed, the lower cabinets would have suffered fairly equal damage. But there was no significant damage to the ceiling, and the lower cabinets burned unequally.

Leroy also testified that the burn patterns in the cabinets beside the stove were consistent with an arson fire. With regard to the left cabinet, Leroy reported that the fire burned through the floor beneath the cabinet, and there was a burn hole through the wall just beneath the area where the countertop rested. He testified that this burn pattern indicated that the fire was trapped underneath the countertop, inside the cabinet. Further, there was no evidence that fire penetrated through the outside walls of the right cabinet. There was no charring to the cabinet's interior walls or drawer, and there were no burn holes through the cabinet. But, even if there were such a hole, there is no way that fire, or burning fluids, could have traveled into the cabinet, bypassed the interior walls and drawer, and ignited the paper towel below. During his testimony, Curran agreed that there were no penetrating burns into the right cabinet.

Following Leroy's testimony, and near the conclusion of Curran's testimony, plaintiffs' attorney informed the court that he intended to introduce exhibit 16, the actual right cabinet from plaintiffs' kitchen, as rebuttal evidence. After the conclusion of defendant's case, he formally moved to admit exhibit 16, claiming that he was "absolutely stunned to hear" Leroy and Curran testify that there was no perforating burn through the right cabinet. The trial court subsequently denied the motion to admit the cabinet, stating that it was "just too late" for plaintiffs to introduce it as evidence. Plaintiffs' attorney also renewed his attempt to admit exhibit 14, the photograph of the cabinet. Defense counsel objected, and the trial court refused to admit the evidence. On rebuttal, Alvin testified that there was a perforating burn through the right cabinet and drew a diagram of the cabinet.

Plaintiffs argue they were denied a fair trial because the trial court improperly excluded exhibits 14 and 16. We disagree.

The decision whether to admit or exclude evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005); *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Even if a trial court abuses its discretion in admitting or excluding evidence, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the error was outcome determinative. *Lukity, supra* at 495-496; *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Generally, all relevant evidence is admissible. MRE 402; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *Wayne County v State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable. MRE 401; *Crawford, supra* at 388; *Wayne County, supra* at 196. Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000); *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Plaintiffs argue that exhibits 14 and 16 were admissible because they were highly relevant to establishing the existence of a fact of consequence at trial. See MRE 401, 402; *Crawford, supra* at 388; *Wayne County, supra* at 196. Plaintiffs assert that there is a large perforating burn, or burn hole, visible in the right cabinet and in the photograph of that cabinet. They assert that the fact that the hole existed is critical to establishing that the fire was accidental, and the admission of either the cabinet or the photograph would have removed any disagreement over the existence of the hole. Defendant argues that the evidence was properly excluded because its probative value was substantially outweighed by the danger of unfair prejudice, undue delay, and waste of time. See MRE 403; *Sabin, supra* at 58; *Aldrich, supra* at 114. Further, defendant asserts that the admission of the evidence would have conflicted with prior court proceedings and orders. See generally MCR 2401(B)(2) and (C)(2).

Plaintiffs first moved to admit the photograph during Wolf's testimony concerning the cause and origin of the fire. Defendant argues that the trial court did not abuse its discretion in excluding the photograph because plaintiffs failed to include it in their exhibit list in accordance with the court's pretrial order regarding exhibits. The order instructed the parties to exchange exhibit lists before trial and stated that the court would not admit any exhibit at trial unless it was included in the exhibit list or unless the need to use the exhibit could not have reasonably been foreseen.

Plaintiffs admit that they did not include the photograph in their exhibit list, but claim the evidence was admissible because it was included in defendant's exhibit list. The trial court's order provides that "each party is to exchange a list" and that exhibits would be excluded "unless they have been listed in the exhibit list" (emphasis added). Based on this language, it is apparent that the order instructed the parties to create individual exhibit lists, and to introduce only those

exhibits which appeared on their own lists. The language of the pretrial order is clear on its face, and the court simply enforced its order when it excluded the photograph.

Moreover, plaintiffs have failed to establish that they could not have reasonably anticipated the need to introduce the photograph at trial. In arguing for the admission of the photograph, plaintiffs' attorney stated:

"Those are probably the best pictures that show the side of the countertop here that Mr. Wolf wants to explain to the jury. And they're just . . . the best photographs of that scene They're certainly relevant. . . . And Mr. Korolewicz [defense counsel] is the one who identified them."

Plaintiffs were aware that their own expert witness intended to testify about the burn hole in the right cabinet, and they clearly felt that this particular photograph provided the best depiction of that portion of the cabinet. Plaintiffs should have reasonably foreseen the need to introduce the photograph at trial.

Further, defendant argues that, because Jack Sanderson took the photograph, the photograph was inadmissible pursuant to the trial court's order granting defendant's motion in limine. The order precluded plaintiffs from referencing Sanderson at trial, directly or indirectly, but for his role in the chain of custody of physical evidence. The trial court reiterated this restriction to both parties at the commencement of the trial.

Plaintiffs argue that exhibit 14 was admissible because Sanderson's testimony was not required to authenticate the photograph. According to plaintiffs, Alvin was present when the photograph was taken and he could testify to its authenticity. But as the trial court pointed out in its order denying plaintiffs' motion for new trial, had there been any question regarding Alvin's testimony about the scene in the photograph, it may have become necessary for Sanderson to testify, and any reference to him was strictly precluded by the court's order granting defendant's motion in limine.

In sum, we find that plaintiffs were well aware of the trial court's orders regarding Sanderson and the parties' exhibit lists, and that plaintiffs attempted to admit the photograph in violation of those orders. Under these circumstances, the trial court did not abuse its discretion in its initial decision to exclude the photograph. See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.").

Plaintiffs moved to admit exhibit 16, the actual right cabinet, as rebuttal evidence. "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001), quoting *Figures*, *supra* at 398. Plaintiffs' attorney claimed to be "absolutely stunned" by Leroy and Curran's testimonies that there was no perforating burn through the cabinet, and offered the cabinet on rebuttal to disprove their testimonies.

At trial, defense counsel argued that plaintiffs' attempt to "spring" this evidence on him at the conclusion of the trial was unfair and prejudicial. We note that one of the purposes of limiting rebuttal evidence is to prevent an unfair ordering of proofs, thereby preventing a party from unduly magnifying evidence by dramatically introducing it late at trial, and by avoiding unfair surprise which might result when a party who thinks he has met his opponent's case is suddenly confronted with a new piece of crucial evidence at the end of the trial. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995). We find that plaintiffs' attempt to introduce the cabinet on rebuttal was, indeed, an "unfair surprise" because it was not included on plaintiffs' exhibit list, pursuant to the trial court's pretrial order, and because of plaintiffs' delay in attempting to admit it at trial.

In denying plaintiffs' motion to admit the cabinet, the trial court emphasized plaintiffs' delay in offering it as evidence. MRE 403. Plaintiffs argue that they could not have anticipated that defendant's experts would lie about the existence of the burn hole in the right cabinet. The trial court found that plaintiffs should have anticipated the need to introduce the evidence at trial and should have included the cabinet on their exhibit list and offered the cabinet as evidence during their case in chief. The trial court elaborated that plaintiffs should not have been "shocked" by Leroy and Curran's testimonies concerning the cause and origin of the fire in light of testimony offered during a hearing on a motion to compel concerning their theory, as well as the fact that plaintiffs possessed a copy of Leroy's incident report that stated the same theory. Further, plaintiffs did not avail themselves of the opportunity to depose Leroy and Curran before trial.

In excluding the cabinet, the trial court also highlighted the waste of time that would have resulted in admitting the cabinet on rebuttal. MRE 403. If the trial court had admitted the cabinet, the parties would likely have found it necessary to recall all of the expert witnesses to testify. Thus, at this late stage of the trial, the admission of the evidence would have produced an excessive waste of the jury's time.

Further, defendant argues that the trial court properly excluded exhibit 16 because the cabinet's condition changed since the time of the fire. At trial, defense counsel pointed out certain gouge marks in the cabinet, as well as portions of the cabinet which appeared to be missing, and claimed that these alterations occurred in the two-and-a-half years since the fire, while the cabinet sat in plaintiffs' unoccupied kitchen. Plaintiffs argued that Alvin could give an offer of proof that the cabinet was in the same condition as it was immediately following the fire. However, we agree with the trial court's conclusion that, although it was uncertain to what degree the cabinet had been altered, the evidence was clearly available to plaintiffs since the time of the fire. For the reasons stated above, we find that plaintiffs could reasonably have anticipated the need to present the cabinet at trial and should have preserved the cabinet as potential evidence.

Plaintiffs renewed their attempt to introduce exhibit 14 on rebuttal. But as noted above, plaintiffs attempted to introduce the evidence in violation of the court's pretrial order regarding the parties' exhibit lists and its order granting defendant's motion in limine. Moreover, for the reasons stated above, we find that the admission of the photograph as rebuttal evidence was properly excluded for reasons of undue delay and waste of time. The trial court did not abuse its discretion in declining to admit the cabinet and photograph at the conclusion of the proceedings.

Further, the court's decision to exclude the evidence was not outcome determinative. *Lukity, supra* at 495-496; *McLaughlin, supra* at 650. Although plaintiffs argue that Leroy and Curran based their opinions as to the cause and origin of the fire on the incorrect belief that there was no burn hole in the right cabinet, plaintiffs ignore key portions of the experts' testimonies that regardless of the condition of the right cabinet, the evidence indicates that the fire was set intentionally. Thus, the admission of the photograph or the cabinet would have had minimal impact on the jury's final decision-making process. Further, plaintiffs implicitly argue that the exclusion of this evidence also contributed to the jury's finding that Sue Ann concealed or misrepresented facts related to their insurance claim. But the cabinet and photograph only relate to the cause and origin of the fire, and other evidence was offered at trial to support the jury's finding concerning Sue Ann. We cannot conclude that the jury would have reached a different decision if the evidence were admitted.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Donald S. Owens